STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2014
v	No. 313105 Kent Circuit Court
CLIFTON TROY RHODES, III, Defendant-Appellant.	LC No. 12-001524-FH

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that resentencing is required. However, I disagree with the majority's affirmance of defendant's convictions. I would instead remand for a *Ginther*[1] hearing on defendant's claim of ineffective assistance of counsel relating to his rejection of the prosecution's plea offer.

Defendant was convicted of attempted fourth-degree criminal sexual conduct, MCL 750.520e; 750.92, in 2000. For the next eleven years he consistently complied with the reporting requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. Pursuant to MCL 28.725a, defendant was required to report two times per year; once between January 1 and January 15 and a second time between June 1 and June 15.

Defendant failed to report as required between January 1 and January 15, 2012. On January 16, 2012, a police officer called him and, according to her testimony, left a voice mail message advising him "that he was late in verifying his address, and at [that] point he was noncompliant and to come in and become compliant ASAP." Defendant did not come in to register until January 18, at which time the officer learned that defendant had a different phone number than that listed on his prior registrations. When the officer asked why he had not come in to register, defendant stated that January 15th had fallen on a Sunday and the next day was Martin Luther King Day.[2]

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] The police department was open each of those days.

Defendant's preliminary examination was scheduled for February 13, 2012. Though he waived the examination, he appeared on that date with his attorney, Kevin Floyd, who represented him throughout the trial court proceedings. During the February 13, 2012 proceeding, the prosecution offered to accept a guilty plea to a single charge of failing to report, a misdemeanor with a maximum 2-year sentence, MCL 28.729(2). In consideration of the plea, the prosecution offered to dismiss the habitual offender count and to not add a second count relating to the failure to provide his correct telephone number. Neither defendant nor Floyd responded to the offer.

A status conference was held in the circuit court on April 9, 2012, at which time Floyd raised an issue concerning the fact that a Caucasian man who was one day late in reporting under SORA in January 2012 had not been charged. He suggested that defendant, an African-American man, was being selectively prosecuted. The trial court adjourned the conference for one week. When the conference resumed on April 16, 2012, the trial court asked defense counsel, "how are we proceeding[]?" to which defense counsel responded, "[Defendant] wishes to have his day in court. A trial, please."

Trial was set for and began on June 6, 2012. Floyd arrived late to the courtroom and was admonished by the court. The prosecutor then moved to exclude any argument or evidence that defendant was being selectively prosecuted. She indicated that she was raising the issue since Floyd had suggested at the status conferences that he was considering raising such a defense. The prosecutor pointed out that selective prosecution was neither a valid defense nor relevant in any way. She also noted that the defense had not notified the prosecution of any witnesses it intended to present in support of such a claim. Floyd then requested dismissal of the charges on the grounds that defendant was being selectively prosecuted and presented the court with a "motion and memorandum in support of motion to dismiss." The trial court responded:

> There is no defense of selective enforcement. Mr. Floyd, I gave you an opportunity to raise this issue a long time ago. When we first had a settlement conference, you approached me and asked for a two week adjournment so that you could address this issue and you could research it, and I said if you are going to raise it, file a motion, I'm here every Friday to hear motions, okay? And raise this issue. You did not, sir.
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> . . . you did not file any motions, nor did you raise this issue. You have not preserved this issue. This is [the] day of trial. You did not supply any notice for any witnesses whatsoever, okay? There is no relevancy in this matter. I'm ruling with the prosecution on this, that this issue is not to be raised during the course of this trial.

Immediately after this colloquy, the prosecutor stated that, "for the benefit of the defendant, we would still allow him to enter a plea to the misdemeanor." The court then clarified, and the prosecutor agreed, that this would be a plea to a "one year misdemeanor" and the court stated that, "very rarely do I send anybody to jail on a one year misdemeanor." The court asked the prosecutor what she expected defendant's sentencing guidelines to be and she

responded that they would prescribe a minimum term of between four and 46 months and that the maximum term was 15 years. The court then further advised defendant that "the last case that I had with Mr. Floyd that we tried, and I believe that gentleman was offered a one year cap and he ended up going to prison for a minimum of 15 years." The defendant responded, "I'm confident in my counsel sir" and "I wish to go to trial, sir."

Defense counsel reserved his opening statement. The prosecution presented proofs unequivocally establishing that defendant had not timely reported and had failed to report an updated phone number when he obtained a new one. During cross examination of one witness, Floyd suggested, contrary to law, that there was a three-day "grace period" for late reporting. When the prosecutor objected, the trial court instructed the jury that no such grace period existed.

Before presenting proofs, Floyd made an opening statement in which he did not assert any basis to find defendant not guilty. With the jury excused, Floyd again sought to raise the issue of selective prosecution. The trial court admonished Floyd, noting that it had already ruled on that issue. Floyd refused to comply with the court's instruction to cease argument on the issue and the court directed that both Floyd and defendant be placed in lockup for a few minutes to consult. After about 20 minutes, the court reconvened and allowed Floyd to make a record concerning his wish to defend the case on the basis of selective prosecution. The trial court noted the objection and again overruled it.

The sole defense witness was defendant himself. He admitted that he received the mailed notification of his registration requirement and that he knew he was supposed to register between January 1 and January 15. No defense was put forward to the charge of failing to report. [3]

More significantly, no reasonable attorney could have concluded that there was a defense to that charge, at least after the trial court's ruling concerning selective prosecution. Nevertheless, defendant declined a plea agreement under which, in exchange for a plea to a one-year misdemeanor,[4] the prosecution would dismiss all other charges, including a habitual offender charge that doubled the length of his maximum term. Defendant's explanation for refusing this very favorable plea bargain was: "I'm confident in my counsel." This surely raises the question of what advice defendant had been given by counsel and why counsel did not seek to re-advise defendant after the court made its ruling striking the selective prosecution defense.

Without the benefit of a *Ginther* hearing, we cannot answer that question. In *Missouri v Frye*, ___ US ___; 132 S Ct 1399, 1409; 182 L Ed 2d 379 (2012), the United States Supreme Court held that ineffective assistance of counsel applies to advice concerning the rejection of plea bargains:

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[3] The defense did offer minimal proofs concerning the failure to provide an updated phone numbers.

[4] Further, the trial court indicated that there was a good likelihood that no jail time would be imposed.

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendant must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it . . . . To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

This rationale has been accepted by Michigan courts. See *People v Douglas*, 296 Mich App 186, 205-206; 817 NW2d 640 (2012).

The comments of the prosecution and the trial court demonstrate that defendant would have received, at most, one year of jail time had he accepted the plea offer and that both the prosecution and the trial court were content to accept the plea. The record also suggests that defendant received his current two- to eight-year prison sentence due to Floyd's bizarre pursuit of legally erroneous defenses. An evidentiary hearing would allow the trial court, and this Court on appeal, to properly determine whether Floyd's representation fell below objective standards of reasonableness and prejudiced defendant. *Id*. Accordingly, this case should be remanded for a *Ginther* hearing.[5]

/s/ Douglas B. Shapiro

[5] This Court denied a motion to remand for a *Ginther* hearing filed during the pendency of this appeal. However, at the time the motion was denied, the transcripts of the hearings and the trial court file were not available to this Court.